

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2013 MSPB 31

Docket No. NY-0831-12-0150-I-1

Albert A. Cerilli, Jr.,

Appellant,

v.

Office of Personnel Management,

Agency.

April 17, 2013

Albert A. Cerilli, Jr., Wappingers Falls, New York, pro se.

Karla W. Yeakle, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has appealed the reconsideration decision of the Office of Personnel Management (OPM) denying his request for an increased survivor annuity benefit. The administrative judge affirmed that decision in an initial decision, and the appellant requests Board review. For the reasons set forth below, we DENY the petition for review and AFFIRM the initial decision.

BACKGROUND

¶2 The appellant's late wife, Kathryn Cerilli, retired from the U.S. Postal Service under the Civil Service Retirement System (CSRS), effective July 31,

2006. In her application for retirement, SF 2801, she chose a reduced annuity with a partial survivor annuity for the appellant equal to 55 percent of \$3600 a year. Initial Appeal File (IAF), Tab 14 at 25. Kathryn died on December 8, 2010, *id.* at 24, and the appellant notified OPM, seeking his benefit. OPM advised him that he was entitled to, and would receive, a monthly survivor benefit of \$178.¹ *Id.* at 11. He replied that that figure was “not plausible,” explaining that he had agreed to a reduced New York State pension in order to leave his wife 25 percent of his total pension upon his death and that it was his understanding that, in reciprocal fashion, he was to receive 25 percent of her pension. *Id.* at 12. OPM responded that, based on the election Kathryn made when she retired, the computed rate of \$178 per month was correct. *Id.* at 11. The appellant requested reconsideration of OPM’s decision, suggesting that he had signed the form without reading it and arguing that he would not knowingly have agreed to receive only a 5.7 percent benefit, *id.* at 8, but OPM upheld its initial decision on reconsideration, pointing out that he had consented to Kathryn’s election before a notary, as is required, and that, while she might have changed her election within 18 months of making it, she did not do so. *Id.* at 5-7.

¶3 On appeal, the appellant repeated the same argument he raised to OPM and also alleged that he did not personally complete all portions of the consent form. He requested a hearing, *id.*, Tab 1, after which the administrative judge issued an initial decision affirming OPM’s reconsideration decision. *Id.*, Tab 20, Initial Decision (ID) at 2.

¶4 In his petition for review, the appellant repeats his argument that his wife completed certain parts of the consent form, and he challenges OPM’s proof that it met its statutory obligation under [5 U.S.C. § 8339](#)(o)(6) to send Kathryn notice that she had 18 months after retirement to provide or increase a spouse’s survivor annuity. Petition for Review (PFR) File, Tab 1. In a timely-filed amendment to

¹ That amount included a recent cost-of-living increase.

his petition, the appellant argues that the consent form is itself unclear and that the initial decision violates the “substance” of the Spouse Equity Act. *Id.*, Tab 2. With his petition, the appellant has submitted an additional document for the Board’s consideration. *Id.* at 4. The agency has responded in opposition to the appellant’s petition. *Id.*, Tab 6. On review, the Board issued an Order in which it noted that the appellant, overall, has asserted that Kathryn’s designation of a reduced annuity must be in error and that the record did not provide in a clear format documentation showing the difference between what Kathryn’s unreduced life annuity would have been and what she actually received as a reduced annuity. *Id.*, Tab 9. Because this information may be relevant to show an absence of mistake in Kathryn’s apparent election of a reduced annuity of 55 percent of \$3600 per year, we afforded the parties the opportunity to submit evidence regarding the actual amount that Kathryn’s annuity was reduced in order to provide for the survivor annuity for the appellant. *Id.* Both parties have filed response pleadings to the Order.² *Id.*, Tabs 10, 11.

ANALYSIS

¶5 Under the CSRS, the surviving spouse of a retired federal employee is entitled to an annuity equal to 55 percent of the retiree’s annuity unless the survivor consented in writing to receive no such annuity or a reduced annuity at the time of the employee’s retirement. [5 U.S.C. §§ 8339\(j\)\(1\), 8341\(b\)\(1\)](#); *Hathaway v. Office of Personnel Management*, [118 M.S.P.R. 678](#), ¶ 7 (2012); [5 C.F.R. § 831.614](#). A retiree may, within 18 months after retirement, choose to elect a survivor annuity for the spouse to whom she was married at retirement if she did not previously do so or to increase the size of such an annuity. [5 U.S.C.](#)

² In its submission, OPM also attached a copy of a booklet, “Your Federal Retirement Benefits,” which it asserts was sent to Kathryn at the time of its final adjudication of her retirement annuity. PFR File, Tab 10 at 14-27. Because this document exceeds the scope of the Board’s Order, it has not been considered in this decision.

[§ 8339](#)(o)(1); *Nunes v. Office of Personnel Management*, [111 M.S.P.R. 221](#), ¶¶ 10-11 (2009); [5 C.F.R. § 831.622](#)(b)(1).

¶6 Furthermore, OPM has a statutory obligation to notify annuitants annually that they have 18 months after retirement to provide or increase a spouse's survivor annuity. [5 U.S.C. § 8339](#)(o)(6). When OPM fails to show that it complied with the statutory notice requirements and "the annuitant's conduct is consistent with his having made the election at issue," survivor benefits have been ordered as if the deceased had made a timely election. *See Simpson v. Office of Personnel Management*, [347 F.3d 1361](#), 1364 (Fed. Cir. 2003).

¶7 OPM bears the burden of proving that the notice was sent as well as proving the contents of the notice. *Nunes*, [111 M.S.P.R. 221](#), ¶ 20. Our reviewing court has found that OPM may establish by preponderant evidence that it sent the notice by submitting the affidavit of the OPM official responsible for printing and distributing retirement forms and notices, which discusses how notices were prepared by the automated computer system and averring that "[g]eneral notices regarding survivor elections were sent to all annuitants' and that, as a result of the procedures OPM followed, 'a notice was sent to each and every annuitant on [OPM's] rolls at the time of each mailing.'" *Schoemakers v. Office of Personnel Management*, [180 F.3d 1377](#), 1381 (Fed. Cir. 1999) (alterations in the original). If OPM can establish through credible evidence that it is more probable than not that it sent the notice, the burden of going forward falls upon the appellant, who must put forth credible testimony or other evidence tending to support his contention that the annuitant did not receive the notice. *Id.* The administrative judge must then decide whether to credit the appellant's evidence of non-receipt and whether such evidence overcomes the presumption that the annuitant received the notice. *See Hathaway*, [118 M.S.P.R. 678](#), ¶ 9.

¶8 The administrative judge appropriately found the appellant signed the SF 2801-2 form, consenting to receive 55 percent of \$3600, before a notary. [5 C.F.R. 831.614](#)(c); IAF, Tab 13 at 28. That he did so without reading it, based

on an understanding he claims he had with his wife, does not render his consent invalid. ID at 2-4. The administrative judge considered the appellant's argument that his wife, not he, printed his name and filled in the date on the consent form but found that the consent was nonetheless valid because the appellant admitted that he signed the form on the same date his wife allegedly printed his name and filled in the date. *Id.* at 4-5. We agree that these arguments fail to provide a basis for relief.

¶9 As to whether the appellant established a basis to belatedly waive the 18-month statutory deadline for increasing the amount of the survivor annuity, [5 U.S.C. § 8339](#)(o)(1), the administrative judge considered the three bases for waiver. *See Speker v. Office of Personnel Management*, [45 M.S.P.R. 380](#), 385 (1990), *aff'd*, 928 F.2d 410 (Fed. Cir. 1991) (Table), *modified on other grounds*, *Fox v. Office of Personnel Management*, [50 M.S.P.R. 602](#), 606 n.4 (1991); ID at 7-8. The appellant has not shown error in the administrative judge's finding that: (1) the statute, [5 U.S.C. § 8339](#)(o)(6), does not provide for waiver, *Nunes*, [111 M.S.P.R. 221](#), ¶ 17; and (2) the appellant did not allege any affirmative misconduct on the part of the Postal Service or OPM, and, in any event, applying equitable estoppel in this case would result in the expenditure of appropriated funds in contravention of statute.³ ID at 6-7. With regard to (3), OPM provided credible evidence, specifically an affidavit from the OPM official responsible for printing and distributing retirement forms and notices, establishing a presumption that Kathryn was sent the required notice regarding survivor annuities. *See Brush*

³ In resolving this issue, we have considered the parties' responses to the Board's Order. In particular, OPM has provided evidence that the total difference between Kathryn's actual annuity and what she would have received if she had made no survivor annuity election for the period between her retirement on August 1, 2006, and death on December 8, 2010, was only \$442.40. PFR File, Tab 10. Thus, contrary to his general argument that some error must have occurred, the evidence supports the conclusion that Kathryn was not mistaken in her election of a reduced survivor annuity for the appellant.

v. Office of Personnel Management, [982 F.2d 1554](#), 1561 (Fed. Cir. 1992); IAF, Tab 15 at 6-11.

¶10 The appellant argues that OPM did not submit a copy of the mailing list, and, thus, it is unknown whether Kathryn was on the mailing list. PFR File, Tab 11 at 5. This argument is based upon a statement in *McDonald v. Office of Personnel Management*, [115 M.S.P.R. 236](#), ¶ 8 (2010), wherein the Board noted that “OPM, however, did not submit a copy of the mailing list used on any of the dates of mailing after the annuitant retired. Thus it is unknown whether the annuitant was on the mailing list.” We note that this statement is followed by a citation to *Nunes* at ¶ 21. In *Nunes*, OPM had submitted the relevant mailing list page. To the extent that *McDonald* may be read to require OPM to submit the mailing list to meet its burden of proof, it must be overruled. In *Schoemakers*, the court indicated that there is no requirement that OPM’s proof relate to any specific notice sent to the particular annuitant. 180 F.3d at 1381. In addition, while the appellant argues that Kathryn never indicated that she had ever received any such notice from OPM, we agree with the administrative judge that the appellant did not present sufficient evidence to overcome the presumption that OPM mailed the notice to Kathryn. *See id.*; ID at 9.

¶11 The appellant’s argument that the form itself is unclear is not a claim he raised below, and therefore the Board need not consider it. *See Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980). Moreover, the claim is at odds with the appellant’s claim before OPM and the administrative judge that he signed the form without reading it. IAF, Tab 13 at 8; Tab 1.

¶12 Finally, as to the appellant’s general claim that the initial decision violates the “substance” of the Spouse Equity Act, the administrative judge correctly found that equitable considerations do not provide a basis for waiving requirements, including filing requirements, that Congress has imposed as a condition to the payment of federal money. *See Schoemakers*, 180 F.3d at 1382; ID at 9-10.

ORDER

¶13 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113](#)(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date of this order. See [5 U.S.C. § 7703](#)(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. See *Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and

Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.